U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
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DATE: September 6, 2000
CASE NO.: 2000 - INA - 233

In the Matter of:
JEAN & CARL WILLIAMS
Employer,

on behalf of

PAULINE YEARWOOD,
Alien.

Appearance: John Savastano, Esq.
New York, NY

Certifying Officer: Dolores DeHaan
New York, NY

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Pauline Yearwood ("Alien") filed by Jean and Carl Williams ("Employers") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, New York City, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the

place where the alien is to perform such labor, and 2) the employment of

the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employers' request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on June 13, 2000; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a ground of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board"). A brief was filed on July 5, 2000.

Statement of the Case

On March 27, 1997, Employers filed an application for alien labor certification in order to fill the position of "Cook, Live out" in their Roosevelt, NY home. The position was described as follows:

> Plan weekly menu, prepare, cook, season and serve meals to household members and guests at lunch, dinner and parties, select and purchase grocery items, clean and stock crockery. Maintain and clean kitchen.

A grade school education and 2 years of experience in the offered job were required. The 40 hour work week encompassed a schedule of 11 a.m. to 8 p.m., and paid a weekly salary of $611.20. The cook must also be willing to work holidays and weekends when necessary. (AF 5).

Employers advertised the position in accordance with the applicable regulations, and 8 responses were obtained. The results of recruitment were reported by letter of September 14, 1998. Employer submitted notes on 4 applicants "who called subsequent to receiving" the certified letter sent to each applicant. All four were rejected. Three were noted to not be interested in the position, and the fourth was rejected for not having proficiency in preparing certain dishes. (AF 14-28).

The CO issued a Notice of Findings ("NOF") on July 13, 1999 which proposed to deny the application on two grounds. First, the CO found that there was insufficient information to establish that

a *bona fide* job opportunity clearly open to U.S. workers existed. In rebuttal, the

Employers were asked to respond to a dozen questions and provide appropriate documentation to show that a position did indeed exist. The inquires concerned the circumstances of the household and duties of the Alien. Second, the CO found that two applicants who appeared qualified on the basis of their résumés had been rejected for unlawful reasons. Specifically, the Employers were directed to document attempts to contact the two individuals. (AF 29-42).

A Rebuttal was filed by the Employers on August 13, 1999. This included an affidavit from Mrs. Williams containing responses to the inquires in the NOF, a letter from a doctor, tax records for the household, and an explanation of the rejection of the two questioned applicants, including proof of attempts to contact them. (AF 43-79).

The CO denied certification through the issuance of a Final Determination ("FD") on January 20, 2000. The deficiency with regard to the two rejected individuals was found rebutted, but the CO found that Employers' evidence failed to establish a *bona fide* position clearly open to U.S. workers existed. Specifically, the CO noted the failure to include actual calendar pages detailing the entertainment related in the affidavit; the failure to break down the amounts of time needed to prepare each meal, which led to a finding that there was not full time (8 hours per day) employment; and an excessive percentage of the family's disposable income devoted to the cook salary. (AF 80-82).

A request for administrative review was filed on February 23, 2000. It was alleged that the Employers had met their burden, and that the CO had drawn conclusions from the evidence which were in error. Details of meal preparation and time were offered, and it was asserted that the family could afford to pay the proposed salary. (AF 91-96). A Brief was filed, and reiterated the information in the request for review.

Discussion

Domestic cook cases are properly reviewed under a totality of the circumstances test, as set forth by the Board in Carlos Uy III 1997-INA-304 (Mar. 3, 1999)(*en banc*). In Uy, it was held improper for the CO to evaluate only whether the alien would be employed for 8 hours per day in establishing a position's *bona fides*. The inquiries set forth in the NOF reflect the factors the Board found relevant to consideration of domestic cook cases.

We agree with the determination of the CO that this is not a *bona fide* position clearly open to U.S. workers, and affirm the denial of certification. However, we do not credit all of her reasons for denial. Specifically, the CO improperly cited the failure to include copied calendar pages in rejecting a portion of the Employers' rebuttal. The NOF instructed the Employers to "describe in detail" their entertainment in the prior year, and to "list the dates...the number of guests...the number of meals, etc." The plain meaning of this language does not require the Employer to submit an actual calendar, but

instead a summary of the information contained therein. If anything, the narrative description by the Employers contains more information than

noting that a birthday party or business meeting took place on a certain day. It is true that the Employer carries the burden of proof in labor certification proceedings, 20 C.F.R. § 656.2(b), and that the NOF stressed the importance of documentation, but we find the detail supplied by Employer, combined with a reasonable explanation for not copying the calendar, adequately responds to the inquiry.[1]

However, the totality of circumstances does not establish that this is a *bona fide* position. The Employers did not offer sufficient detail to support the assertion that there exists full-time employment in this case. Some further detail was offered in the request for review to explain how preparing 2 meals a day for 4 or more people, plus shopping, accounts for 8 hours a day, but this is information which was requested by the CO, and not supplied. Our review is limited to the record upon which denial was based, and so we do not consider evidence submitted after the issuance of the FD. Capriccio's Restaurant, 1990-INA-480 (Jan. 7, 1992). The lack of proven full time work is one factor to be considered.

We also agree that the investment by the household in the Alien's salary does appear to be excessive. Approximately 54% of Employer's disposable income would go towards salary. Employer argues that such is actually cheaper than eating out "in light of the time and health consequences." The case cited by Employers, Kolahi, 1997-INA-453 (1998), held that spending in excess of 1/2 of income on a cook's salary was unreasonable, which appears to support the CO's contention. Employer also attempts to reduce the percentage by comparing the salary to income, rather than disposable income.

Finally, we note that although Mr. Williams apparently suffers from some health problems, there is no evidence that a special diet is required for him. The doctor's note (AF 71) merely includes a diagnosis, not a direction to eat a low fat or low sodium diet. We find that the totality of the evidence does not support a finding that this is a *bona fide* position.

Order

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[1]Employer stressed that much of the calendar information was irrelevant to the scope of the CO's inquiry, and also that their privacy rights would be impinged upon by producing the appointment calendar. We reject the privacy argument, as the Employers can redact information they wish to keep private. As well, the Employers could copy only relevant sections of the document. An employer risks denial by not supplying all documentation which is reasonably available. Our holding is limited to the facts of this case, and reflects the detail provided by the Employer. Bare assertions of fact are generally not sufficient to carry the Employer's burden. *See, e.g.*, A.V. Restaurant, 1988-INA-330 (Nov. 22, 1988); Our Lady of Guadalupe School, 1988-INA-313 (June 2, 1989).

Based on the foregoing, the Final Determination of the CO is affirmed, and labor certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.